

IN THE MATTER OF	:	BEFORE THE
PHILIP C. ROUSSEAU, WILLIAM	:	HOWARD COUNTY
JOHNSON, & RONALD L. YAFFE	:	BOARD OF APPEALS
Appellants	:	HEARING EXAMINER
vs.	:	BA Case No. 628-D
HOWARD COUNTY DEPARTMENT OF		
PLANNING AND ZONING, WEGMANS		
FOOD MARKETS, INC., & SCIENCE		
FICTION, LLC		

Appellees

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DECISION AND ORDER

On July 28, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the merits of the administrative appeals of Philip C. Rousseau, William Johnson, and Ronald L. Yaffe (the "Appellants").¹ The Appellants are appealing the Howard County Department of Planning and Zoning's ('DPZ') December 14, 2007 determination that F-07-208 is technically complete, based in pertinent part on an updated Adequate Public Facilities Ordinance ("APFO") roads/traffic study. The appeal is filed pursuant to Section 16.105(a) of the Subdivision and Land Development Regulations (the "Subdivision Regulations").

The Appellants certified that notice of the hearing was advertised and that the property owner and adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

¹ In a Motions Order dated May 29, 2008, I dismissed the petition of Carvel Mays in BA Case No. 628-D for lack of standing. However, I denied Appellees' Wegmans and Science Fiction's motion to dismiss the appeal petition of Mssrs. Rousseau, Yaffe, and Johnson for failure to perfect a timely appeal, where the filing fee did not accompany the submission of the petition. The May 29, 2008 Order is incorporated by reference into this final Decision and Order.

Susan Gray, Esquire, represented Appellants Philip C. Rousseau, William Johnson, and Ronald L. Yaffe. Richard Talkin and Sang Oh, Esquires, represented Appellees Wegmans Food Markets, Inc. and Science Fiction, LLC ("Wegmans"). Paul Johnson, Deputy County Solicitor, represented DPZ.

General Background

In 2007 the Howard Research and Development Corporation (General Growth Properties) ("GGP") petitioned the Howard County Planning Board (the "Board") to amend a final development plan ("FDP") (FDP-117-A-II) by adding the phrase "full service food and grocery stores, and related uses, of 100,000 square feet or more" as a "permitted use" under Criteria 7D, "Employment Center-Industrial Land Use Areas." This Final Development Plan, F-07-208, encompasses a 181±-acre parcel of "New Town" zoned land known as the Sieling Industrial Center, Section 1, Area 1. The subject property lies on the west side of Snowden River Parkway between MD 175 and Oakland Mills Road. After public hearing, the Board by letter dated September 6, 2007 informed GGP of its approval of the requested FDP amendment (the "Amended FDP"), stating it clarifies that large full service food and grocery stores, and related uses are a permitted use under Criteria 7D, "Employment Center-Industrial Land Use Areas."²

Wegmans also submitted a Site Development Plan ("SDP")--SDP-07-131—for the amended FDP to DPZ for its review and, eventually, for the Planning Board's final approval.³ Additionally, Wegmans submitted a Final Subdivision Plan, F-07-208, for the proposed grocery store and the County processed this plan concurrently with the SDP. Pursuant to the Subdivision

² In BA Case No. 620-D, decided March 20, 2008, I granted Wegmans' motion to dismiss Carvel Mays' appeal of the Planning Board decision to approve the amendment for lack of standing.

Regulations, Wegmans submitted a traffic impact analysis ("TIA") in the form of an updated APFO roads test as part of its F-07-208 submission. By letter dated December 14, 2007, DPZ informed Wegmans of the Subdivision Review Committee's determination that F-07-208 was technically complete, subject to certain comments and concerns. According to the Technical Staff Report ("TSR")⁴ prepared for the Planning Board in its consideration of the SDP, DPZ's Development Engineering Division ("DED") and the Department of Public Works ("DPW") determined the F-07-208 Plan met APFO capacity and mitigation standards and that roads serving the project would be adequate (TSR, Page 3).

Appellee Science Fiction, LLC, is the owner of Parcel "D-2" in the Sieling Industrial Center, Section 1, Area 1, where a large full service and grocery store is permitted under the Amended FDP. Appellee Wegmans is a large full service food and grocery store proposing to construct a store on Science Fiction's property.

Appellants Philip C. Rousseau, William Johnson, and Ronald L. Yaffe are residents of Howard County who are opposed to the amended FDP. In this case, they are appealing the DPZ's December 14, 2007 letter approving in part the APFO roads test for F-07-208.⁵ They contend DPZ based its APFO approval decision on an erroneous traffic study. They claim to be aggrieved because their use and enjoyment of their residential property will be diminished because of increased traffic and because their personal safety will be compromised.

Burden of Proof

Section 10.2(c) of the Hearing Examiner Rules of Procedure provides that "[i]n any other

³ In BA Case No. 632-D, decided June 23, 2008, I granted Wegmans' motion to dismiss the Appellants' appeal of the Board's decision to approve this SDP for being untimely filed.

appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

The Appellants' Evidence and Testimony

The Appellants presented Frank Tavani, FTA, as a traffic witness. Mr. Tavani testified to being a professional traffic engineer licensed in Pennsylvania and Maryland and preparing or reviewing traffic impact analyses. At the outset of his testimony, he introduced into evidence Appellants' Exhibit 1, a 44-page submission consisting of the following documents.⁶

A. January 23, 2008 letter to the Howard County Planning Board from Richard Talkin Esquire, on behalf of Wegmans, submitted to provide additional information in response to submissions in opposition to the application of approval for SDP 07-131, as set forth in Susan B. Grey's letter of January 17, 2008. The January 23 letter states that the APFO traffic report was reviewed and approved by DPZ in conjunction with a final subdivision plat of the property and provides a point-by point response to the traffic comments in Ms. Gray's letter and a report by F. Tavani and Associates, Inc. ("FTA").⁷ (Pages 1-6)

B. A January 22, 2008 letter from The Traffic Group's Wes Guckert. The letter is a follow-up to the Traffic Group's review of the FTA comments. (Pages 7-8)

C. Excerpts from the Institute of Traffic Engineers ("ITE") Trip Generation Handbook, including background information of pass-by, primary, and diverted linked trips, specific information for ITE land Use 850. (Pages 9-15)

D. A January 8, 2008 cover letter to Mark DeLuca, Howard County, from Glenn Cook, of the Traffic Group, and a resubmission of various exhibits. (Pages 16-44)

⁴ Appellants included the pertinent TSR page with the petition.

⁵ Appellants' petition incorrectly identifies the plan being appealed as the amended FDP and the SDP.

⁶ The submission was not paginated. For the reader's convenience, I have added page numbers.

⁷ Mr. Tavani's testimony was derived, apparently, from this report, which was not introduced into evidence. I also note for the record that during the proceeding, I asked for, and received, a copy of the sections of the Howard County Design Manual from which Mr. Tavani quoted at length. These regulations, including Chapter 4, Adequate Road Facilities Test Evaluations Requirements and Chapter 5, Traffic Studies, are deemed part of the record pursuant to Hearing Examiner Rule 9.6.

Mr. Tavani's opinion testimony centered on two aspects of the TIA's Trip Generation calculations: (1) the amount and manner of "passby" traffic applied and (2) the omission of any Saturday analysis.

(1) The amount and manner of passby traffic applied.⁸ Based on the ITE's Land Use category for supermarkets (Land Use 850), and referring to Table 5.16 (Page 11), Mr. Tavani testified the TIA should have used a passby trip rate smaller than the 36% average passby trip rate for Land Use 850. He based this opinion based on: (1) his professional judgment that the larger the supermarket, the more it becomes a destination (a purposeful drive) rather than a convenience, and (2) Chapter 5.2.B.3⁹ of the Design Manual, which he quoted as stating, "caution and judgment should be used in applying the trip generation rates."

He opined that if the passby rate was closer to 18-20% (300) for peak hours, additional trips could be added to peak hour trips.

(2) The Omission of Any Saturday Analysis

It was also Mr. Tavani's opinion that the omission of a Saturday analysis is a study flaw. He stated the ITE provides the Saturday p.m. traffic is highest in some circumstances and it would have been prudent for the TIA to include some Saturday analysis owing to the actual nature of the proposed use, which to him was more like a shopping center than a supermarket.

While acknowledging the January 23, 2008 letter's suggestion that TIA's Friday traffic exceeded Saturday traffic (Page 3), he referred to Chapter 5 of the Design Manual, where

⁸ Passby trips are interim stops for a planned purpose or an "impulse" trip.

⁹ Mr. Tavani incorrectly referenced this section as Section 5.2.5.c.

Section 5.B.4.a states: "[a] shopping center's peak may occur on a Saturday afternoon between 2:00 and 3:00 p.m. Such a situation may require analysis for several time periods."

Lastly, in response to questioning, he stated he could not testify that the project would fail the APFO tests if the TIA used a smaller passby rate and incorporated the data from a Saturday traffic analysis.

Discussion

Upon consideration of the evidence presented, and for the reasons stated below, I have determined to deny the Appellants' appeals because they have not shown by substantial evidence DPZ's decision to approve the APFO study was clearly erroneous, arbitrary and capricious, or contrary to law.

The 2006 Howard County Design Manual, Volume III, Section 5.2.B.3, requires traffic impact studies to use the ITE's median values and land use development categories.

"Traffic volumes generated by new development shall be based upon the median values in the most current edition of the [ITE] publication "Trip Generation" that most closely reflect proposed subdivisions and land development plans The use of trip generation rates other than those in ITE's 'Trip Generation' is subject of approval by the Chief, Bureau of Engineering or Department of Planning and Zoning."

The TIA applied the median values for Land Use 850, supermarkets and there is no evidence of DPZ requiring the traffic study to use non-ITE trip generation rates.

I am not persuaded by Appellants' argument that DPZ's decision to approve the TIA was arbitrary or capricious for failing to modify the study based on the Design Manual's guidance statements relied upon in Mr. Tavani's opinion testimony. The same Design Manual paragraph which Mr. Tavani cited for his opinion that a Saturday analysis should have been conducted

contains this caveat: while a level of service analysis may be required to obtain peak flows on Saturday afternoon "...[t]he *normal procedure* is to analyze the Design Hourly Volumes developed by traffic projection for the AM and PM peaks hours." Design Manual 5.2.5.B.¹⁰ (Emphasis added.) In the absence of substantial evidence that DPZ should have required the TIA to depart from normal procedures, I find no error. Indeed, Mr. Tavani himself could not say the project would fail the APFO tests even if the TIA used a smaller passby rate and included a Saturday analysis.

I am similarly unpersuaded by Mr. Tavani's opinion that the Manual's caution to use judgment in applying the trip generation rates has directly applicability to reducing the passby rate. The remainder of the paragraph following this statement indicates that it is a qualified or limited caution, one intended to alert traffic study analysts to heed a potential reduction not in passby rates, but in certain alternate modes of transit, such as mass transit, carpooling, and schools.

¹⁰ In this regard I note that Page 4 of the January 23, 2008 letter to the Howard County Planning Board from Talkin and Oh, which is part of Appellants' Exhibit 1, states that The Traffic Group's Supplement included an analysis of various traffic studies conducted for Wegmans stores over the last ten years. These studies show that the Saturday trip generation at these stores was less than the ITE Trip generation rates.

ORDER

Based upon the foregoing, it is this 11th day of August 2008, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petitions of Appeal of Philip C. Rousseau, William Johnson, and Ronald L. Yaffe in BA Case No. 628-D are hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

Michele L. LeFaivre

Michele L. LeFaivre

8/12/08

Date Mailed

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing